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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/795,967	03/08/2004	Bernadene Ann Magnuson	4010.3004 US1	8630
38473	7590	12/23/2005	EXAMINER	
ELMORE PATENT LAW GROUP, PC 209 MAIN STREET N. CHELMSFORD, MA 01863			MCCORMICK EWOLDT, SUSAN BETH	
		ART UNIT	PAPER NUMBER	
		1655		

DATE MAILED: 12/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/795,967	MAGNUSON ET AL.
	Examiner S. B. McCormick-Ewoldt	Art Unit 1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 12 October 2005.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1,2,7,8,10,11,13,14,16,17,19 and 22 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1,2,7,8,10,11,13,14,16,17,19 and 22 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date October 12, 2005.

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_.

**DETAILED ACTION**

The amendment of October 12, 2005 is hereby acknowledged and entered.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

*Election/Restrictions*

Applicant elected Group I and the species chokeberry in the reply filed on April 15, 2005. Claims 23-27 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on April 15, 2005.

*Claims Pending*

Applicant has cancelled claims 3-6, 9, 12, 15, 18 and 21. Claims 1-2, 7-8, 10-11, 13-14, 16-17 and 19 will be examined.

*Claim Rejections - 35 USC § 112*

The rejection under 35 USC § 112, second paragraph has been withdrawn in view of Applicant's clarification.

*Claim Rejections - 35 USC § 103*

Claims 1-2, 7-8, 10-11, 13-14, 16-17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen (US 2003/0031734 A1) in view of Internet website <http://www.aronia.dk/information/anthocyanins.htm>.

Rosen (US 2003/0031734 A1) discloses that anthocyanins are potential anti-carcinogenic elements and anthocyanins inhibit tumor cell growth. Rosen does not specifically disclose using the anthocyanins from chokeberries. However, the website <http://www.aronia.dk/information/anthocyanins.htm> discloses that chokeberries are one of the

riches sources of anthocyanins. Applicant's arguments filed October 12, 2005 have been fully considered but they are not persuasive.

**Applicant argues** that Rosen does not disclose the use of anthocyanins from chokeberries nor the methods as claimed. In addition, **Applicant argues** the website also does not disclose or suggest the inhibition of cancer cells. This is not persuasive to the response of Applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The prior art taken together teaches that chokeberries are anthocyanin-rich and anthocyanins are known in the art have anti-carcinogenic properties. This combination of references then leads to a product with the same characteristics as claimed by Applicant.

**Applicant argues** the Examiner's statement that the effects on tumor growth and cell growth cycle are intrinsic to the blueberry extracts as disclosed in Rosen. This is not persuasive because anthocyanins are known in the art to have anti-carcinogenic properties. However, as defined by Applicant in the specification, the amount of anthocyanin that can treat tumor growth also will intrinsically have the other effects on Cox 2 and other gene expression. Thus, the method taught by the references intrinsically contains the effects claimed.

**Applicant argues** that the blueberry extract in Rosen does not possess the same intrinsic properties as the chokeberry extract. This is not found persuasive because as discussed above, chokeberries are known to be anthocyanin-rich and anthocyanins are known to have anti-carcinogenic properties. As defined by Applicant in the specification, the amount of anthocyanin that can treat tumor growth also will intrinsically have the other effects on Cox 2 and other gene expression. Thus, the method taught by the references intrinsically contains the effects claimed.

Therefore, the rejection is deemed proper and is maintained.

Summary

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Correspondence

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Susan B. McCormick-Ewoldt whose telephone number is (571) 272-0981. The Examiner can normally be reached Monday through Thursday from 6:00 a.m. to 4:30 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Terry McKelvey, can be reached on (571) 272-07475. The official fax number for the group is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Susan D. Coe*  
12-15-05

sbme

**SUSAN COE  
PRIMARY EXAMINER**